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IN THE

# Supreme Court of the United States

OCTOBER TERM 1935.

No. 377.

ASA H. WHITFIELD,
Petitioner,

vs.

THE STATE OF OHIO.
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio.

## BRIEF FOR THE RESPONDENT.

ALFRED CLUM,
Director of Law, City of Cleveland,
STEPHEN GOBOZY,
Asst. Pros. Attorney, City of Cleveland,
Counsel for Respondent.

Of Counsel:
JOHN W. BRICKER,
Attorney General of Ohio,
WILLIAM S. EVATT,
Chief Counsel, Office of Attorney General,
HARRY B. HAWES,
RAYMOND A. WALSH,
BON GEASLIN,
Special Counsel.

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THE STATE OF OHIO. Respondent.

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## BRIEF FOR THE RESPONDENT.

## OPINIONS BELOW.

The opinion of the Court of Appeals of Cuyahoga county, for the Eighth District of the state of Ohio (see petition for writ of certiorari, p. 26), is reported in 49 Ohio App., 530, 197 N. E., 605. The order of the Supreme Court of Ohio dismissing the petition in error, R., 29, is found in 129 Ohio State, 543, 196 N. E., 164.

## JURISDICTION.

The application of the petitioner herein for a rehearing was denied by the Supreme Court of Ohio on May 29, 1935, R., 29.

The petition for writ of certiorari to the Supreme Court of Ohio was filed August 19 and was allowed on October 14, 1935, R., 29. The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended (Sec. 344, Title 28, U. S. C. A.).

## QUESTIONS PRESENTED.

(1) Whether the act entitled "An act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases," approved January 19, 1929, (45 Stat., 1084, 49 U. S. C. A., Ch. 2A, Section 65), and known as the Hawes-Cooper Act (see Appendix), is violative of the Commerce Clause and the Tenth and Fourteenth Amendments of the Constitution of the United States.

(2) Whether, in view of the provisions of the Ohio Constitution and legislation enacted thereunder, and in view of the enabling act of Congress, the Hawes-Cooper Act, supra, Sections 2228-1 and 2228-2 of the General Code of Ohio (see Appendix), forbidding the sale on the open market in Ohio of prison-made goods and imposing penalties for the violation thereof, are in conflict with

the above noted provisions of the Constitution of the United States. Section 41, Article II of the Constitution of Ohio and Sections 2228, 2230, and 2231, General Code of Ohio, are also pertinent and are quoted in the Appendix.

## SUMMARY OF ARGUMENT.

I. This court has repeatedly considered conditions confronting Congress when passing upon its acts to meet those conditions.

II. Power of Congress to regulate commerce is supreme.

III. Definition of the power to regulate interstate commerce.

IV. Congress in the regulation of interstate commerce has sought, wherever possible, to remove impediments to the operation of state laws, and such acts have been consistently upheld by this court.

V. Exercise of power to regulate may, when necessary, take the form of prohibition.

VI. The extent to which a power of Congress to regulate may be exercised, is within the discretion of Congress.

VII. The Hawes-Cooper Act delegates no power to the states to regulate interstate commerce, and has been so construed.

VIII. The child labor case supports the constitutionality of the Hawes-Cooper Act.

IX. Origin of commodities does not exempt interstate commerce in them from regulation by Congress.

X. Under its police power a state may prohibit the sale on the open market of prison-made goods.

XI. The provisions of the Ohio statutes are reasonable regulations designed to promote the public welfare.

XII. The enforcement of the statutes involved does not violate the Tenth Amendment.

XIII. The Ohio law prohibiting the sale of prison-made goods on the open market is not violative of the Fourteenth Amendment.

XIV. Conclusion.

## ARGUMENT.

### I.

### THIS COURT HAS REPEATEDLY CONSIDERED CONDITIONS CONFRONTING CONGRESS WHEN PASSING UPON ITS ACTS TO MEET THOSE CONDITIONS.

In determining the questions presented in this case we inquire first as to the occasion for the legislation and its history.

**Nebbia v. New York**, 291 U. S., 502, 515, 78 L. Ed., 940, 944;
**United States v. Anderson**, 9 Wall., 56, 65, 19 L. Ed., 615, 617;
**Costanzo v. Tillinghast**, 287 U. S., 341, 345, 77 L. Ed., 350, 353.

We must look to contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative bodies to determine the evil which it is designed to remedy.

**United States v. Union Pacific R. Co.**, 91 U. S., 72, 79, 23 L. Ed., 224, 228;
**United States v. Laws**, 163 U. S., 258, 262, 41 L. Ed., 151, 153;
**United States v. Missouri Pacific Railroad Co.**, 278 U. S., 269, 278, 73 L. Ed., 322, 377.

### (a) Congressional History Discloses Early Recognition of Evils Resulting from Sale of Prison Made Goods on the Open Market.

As far back as the Fifty-eighth Congress a bill similar to the **Hawes-Cooper Act** was favorably reported in the house of representatives. Subsequently similar bills were favorably reported in the house of representatives in the Fifty-ninth, Sixty-first, and Sixty-second Congresses. In the Sixty-third Congress a bill in almost identical language as this act was passed by the house of representatives by a vote of 305 to 2, and favorably reported in the senate.

The committee in reporting this bill in the senate stated: "The necessity for such legislation arises from the fact that each state endeavors to shunt the products of its convict labor upon other states, and thus fails to meet its own responsibility." (Report No. 771, U. S. Senate, 63rd Congress, 2nd Session, p. 2.)

In the first session of the Sixty-fourth Congress substantially the same bill was reported in the house of representatives. In that report the committee enumerates some of the evils of the unregulated commerce in prison-made goods, which it was sought to overcome by legislation. At that time (1916) the committee stated that, "While the number of convicts in state prisons is small compared with free labor, their output, being sold for less than goods made under normal wage conditions, suffices to blight many industries."

The report further pointed out that of all leather whips and whiplashes, other than buggy whips, 90 per cent of the total production was prison-made; that in blacksnake whips and cheap whiplashes, 99 per cent were prison-made, and this industry had been almost entirely abandoned to the prisons; that fully 90 per cent of saddletrees were prison-made, only special patented shapes being attempted by outside manufacturers; that of stove hollow ware—the cheaper grades of kettles, skillets, etc. —99 per cent were prison products, the industry having been abandoned by the outside manufacturers, who as stove producers had become largely the jobbers of prison hollow ware; that in many lines manufacturers had been compelled by prison competition to entirely change their line of products, and in cases where that could not readily be done they had been forced to suspend business altogether.

The committee further pointed out that:

> "Twenty per cent of the regular shoe factory output must compete with convict-made goods; the competing output of the convict factories is but one-eighth of this 20 per cent (16 per cent), yet it serves to demoralize the whole industry.
>
> "Five states contracted their convict labor to one furniture-making firm in 1905, the competition being severely felt in the industry. The same is true of cooperage in the Chicago market, where it was estimated by the Illinois state commissioner of labor that 67.8 per cent of all pork barrels, beef and lard tierces, and lard kegs used at the packing establishments were made in Joliet prison, and it was shown that many private concerns had been forced out of business and those remaining pushed close to the

deficit line. In shirts, overalls, handkerchiefs, hosiery, and other similar lines exploited convict labor, at wages (the return to the state) rarely equal to one-half the pay of free labor, has seriously damaged the field of the manufacture and industry. * * *

"The demoralization of industries and their abandonment to prison manufacture, as in the case of certain kinds of brushes, of cheap stoves and hollow ware must drive workmen out of their trades and away from their homes and wonted means of livelihood, to which they have been accustomed and compel them to learn new trades, or to sink to the level of unskilled labor." (Report No. 75, House of Representatives, 64th Congress, 1st Session.)

In 1924 the secretary of commerce appointed a representative committee to act as an advisory body and to collaborate with the department of commerce in making a study of the prison-industry problem, and the Congress had before it the facts set out in the report of this committee. (Domestic Commerce Series, No. 27, Department of Commerce. See Congressional Record, Vol. 70, Pt. 1, p. 656.) In its conclusions the committee stated that certain of the major factors in the normal cost of production which must be met by all manufacturers are entirely absent in the production of prison products, and that the effect of placing on the open market a volume of goods produced below normal costs is to bring about a disorganization of the markets, and that, "The increase in prison production which is predicted, will make it difficult, if not impossible, for manufacturers employing free labor to continue operation in trades where the prison output becomes heavy."

It was further stated in the report:

"Evidence of the fact that prison-made goods can enter any market at will against products of free industries has been amply provided by the report, Convict Labor in 1923, issued by the United States department of labor. Developments in the marketing of garments, which according to that report made up $18,526,686 of the $44,843,355 worth of prison products sold on the open market in 1923, furnish further evidence of the disturbance caused by contractors or state officials in charge of prison industries.

"The broom industry reports a similar situation. Robert C. Norman, of New York City, testified before the congressional committee on labor March 5, 1926, that out of 50,000 tons of broomcorn usually cut per annum at least 12,500 tons are worked up in prisons. The binder twine and the chair industries report similar conditions. Other trades are affected but not to such a large proportional extent.

"The complaint is made that these goods are sold without identification and the buyer does not know, in most cases, that he is buying prison-made products." (P. 2.)

* * * * * * * * * *

"* * * Furthermore, experience seems to indicate that it is difficult for any one state to bring about the solution of its own marketing problems unless it can control prison products from other states when they enter its borders." (P. 12.)

* * * * * * * * * *

"The question, however, has been raised whether any state has a right to support its prisoners out of the profits realized on sales to the citizens of other states, received either directly or indirectly through a private contractor." (P. 12.)

The report also showed that certain items usually entering into production costs, such as rent, many overhead items, selling costs and factory labors are absent. It was stated to be the practice of those dealing in prison-made goods to place either false or misleading labels upon them, so as to conceal from, or to mislead the prospective customer as to their origin.

**(b) To Enable the States to Enforce Their Own Laws for the Protection of Their Public Welfare, Congress Passed the Hawes-Cooper Act on January 19, 1929.**

The committees reporting the **Hawes-Cooper** bill took note of certain abuses which could only be controlled by the uniform regulation of interstate commerce in prison-made goods, which the Congress alone was empowered to make. Their reports state:

> "The testimony before your committee brought to light certain evils of present conditions.
>
> "It was shown that in one state where the people of the state, through their Legislature, enacted a law requiring the labeling of convict-made goods, the prisoners in the penitentiaries of that state were engaged in the manufacture of shirts and shoes which were sent out into other states to be dumped on the competitive market bearing labels of misrepresentation.
>
> "In the same state the shield of the United States and the lettering 'U. S.' were fraudulently placed upon the shoes for the purpose of misrepresentation and deceit. Such false labels were being placed upon products by the prisoners themselves, and in one instance they were admittedly placed on products 'at the direction of the warden.'

"State laws against such deception and fraud are ineffective. State labeling laws and similar legislation are unenforceable, and the objectionable conditions which exist are permitted to continue only because states can not enforce their own statutes.

"The state, representing the public opinion of that state by enacting laws through its legislators to prevent the sale of convict-made goods, is powerless to enforce its own will, because other states use its market as a dumping ground for surplus convict-made goods.

"With the result that New York (for illustration) regulates the sale of convict-made goods, and the products of its own convicts are eliminated from the state market, but at present the prison contractor may dump upon the New York market the products of convicts from other states.

"The state is rendered helpless, its own laws are defeated and the prison contractor, in defiance of the public opinion of that state, secures a personal profit, first, from the state of origin; second, from the prisoner; and third, from the market of the state which is unable to protect itself.

"The result is apparent. The products of convicts are not sold upon the market where state use is in force and yet every other state where the contract system is used may do the thing that the law of that state prohibits.

"The bill therefore does not interfere with the rights of states, but it does assist in preserving the right of self-determination for each state."

* * * * * * * * * *

"However desirous any state in the union may be of putting an end of the contract system, its efforts are futile for the reason that it can not rid itself of misbranded and falsely labeled products sent into its borders by prison manufacturers who hold themselves out as legitimate manufacturers.

"As a result of present conditions it is only natural that those who are profiting from the prison contract system will seek to interfere with any movement in any state looking to the adoption of a different system.

"The disparity in wages paid prisoners and those paid free labor need not be discussed, as the facts borne out by testimony are matters of common knowledge." (Report No. 344, U. S. Senate, 70th Congress, 1st Session, p. 4.)

The Congress adopted the **Hawes-Cooper Act** as an aid to the states in correcting the evils which its numerous investigations, and those of other departments of the government showed could not be expected to right themselves, and which, it was asserted, the states did not have the power to correct owing to the conditions existing under the dual form of our government.

This act merely prescribes regulations for accomplishing the introduction and incorporation of prison-made goods into and with the mass of the property of the state, thereby removing what had been urged as an impediment to the enforcement of state laws in respect to such goods.

## II.

## POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE IS SUPREME.

It must be admitted that if this statute is a legitimate exercise of the power delegated to the Congress to regulate commerce among the states, the conviction of the petitioner must stand.

It is well, therefore, to inquire as to what power over interstate commerce is vested in Congress by the Constitution; and to what extent the courts have said this power may be exercised. The provision of the Constitution giving the Congress such power is found in Article I, Section 8, Clause 3, which invests Congress with the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The power conferred upon Congress to regulate interstate commerce is plenary, and it is settled by all the authorities that the power extends to every part of interstate commerce and to every instrumentality and agency by which it is carried on. And except as to those police regulations of the states which incidentally affect interstate commerce, such commerce is subject only to the regulations which may be imposed by Congress and until Congress has legislated on the subject it is to be free of any restraints.

**Robbins v. Shelby County Taxing District**, 120 U. S., 489, 30 L. Ed., 694;
**Leisy v. Hardin**, 135 U. S., 100, 34 L. Ed., 128.

Probably the leading case under the commerce clause of the Constitution is **Gibbons v. Ogden**, 9 Wheat, 1, 6 L. Ed., 23. Referring to the power of Congress to regulate commerce, Chief Justice Marshall said:

> "This power, like all others vested in Congress, is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." P. 196 (70).

This doctrine has been repeatedly affirmed by this court.

**Addystone Pipe & Steel Co. v. United States**, 175 U. S., 211, 44 L. Ed., 136;
**Champion v. Ames**, 188 U. S., 321, 47 L. Ed., 492;
**Atlantic & P. Teleg. Co. v. Philadelphia**, 190 U. S., 160, 47 L. Ed., 995;
**Northern Securities Co. v. United States**, 193 U. S., 197, 48 L. Ed., 679;
**Simpson v. Shepard**, 230 U. S., 352, 57 L. Ed., 1511;
**Sligh v. Kirkwood**, 237 U. S., 52, 59 L. Ed., 835;
**Robbins v. Shelby County Taxing District, supra**;
**Second Employers Liability Cases**, 223 U. S., 1, 56 L. Ed., 327.

## III.

## DEFINITION OF THE POWER TO REGULATE INTERSTATE COMMERCE.

It is said in **Gibbons v. Ogden, supra**, that commerce:

> "describes the commercial intercourse between nations, and parts of nations, in all its branches, **and is regulated by prescribing rules for carrying on that intercourse.**" P. 189-190 (68). (Boldface ours.)

In **Northern Securities v. United States, supra,** it was held with respect to the power of Congress to establish rules by which interstate commerce shall be governed, that: "in some circumstances regulation may properly take the form and have the effect of prohibition." P. 335 (699).

And in the case of **United States v. E. C. Knight Co.,** 156 U. S., 1, 12, 39 L. Ed., 325, 329, the court said:

> "The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed * * *."

And in the same opinion Mr. Chief Justice Fuller stated for the court that:

> "The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints." P. 11 (329).

In **Mobile County v. Kimball,** 102 U. S., 691, 696, 26 L. Ed., 238, 239, it was stated that the power to regulate commerce

> "authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety."

In the **Second Employers Liability Cases, supra,** it was stated to be the power

> "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." P. 47 (345).

And in **Brown v. Maryland**, 12 Wheat., 419, 6 L. Ed., 678, it was said that an essential part of the regulation of commerce, and the principal object of it, is to prescribe the regular means for accomplishing the introduction and incorporation of imported articles into and with the mass of the property in the state. P. 448 (688).

## IV.

## CONGRESS IN THE REGULATION OF INTERSTATE COMMERCE HAS SOUGHT, WHEREVER POSSIBLE, TO REMOVE IMPEDIMENTS TO THE OPERATION OF STATE LAWS, AND SUCH ACTS HAVE BEEN CONSISTENTLY UPHELD BY THIS COURT.

The recognition by Congress of local laws and local policies in respect to matters within the jurisdiction of the federal government is neither new in theory, nor recent in practice.

Although regulations over commerce includes the regulation of the qualifications and services of pilots, the first Congress assembled under our Constitution, by an act approved August 7, 1789, provided that until further legislation upon the subject by the Congress all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall be subject to the state laws then in force or thereafter enacted by the states wherein such pilots may be. (1 Stat., 54, 46 U. S. C. A., 211.)

Statutes enacted by various states pursuant to this authority have been sustained.

**Cooley v. Port Wardens**, 12 How., 299, 13 L. Ed., 996;
**Olsen v. Smith**, 195 U. S., 332, 49 L. Ed., 224.

By an act approved June 5, 1794 (1 Stat., 378), the Third Congress made provision for the laying of duties and licenses for selling wines and foreign liquors by retail, and requiring that retail dealers in such commodities obtain licenses. This statute provided "that no license shall be granted to any person to sell wines, or foreign distilled spirituous liquors, who is prohibited to sell the same by the laws of any state."

An act of February 25, 1799 (1 Stat., 619), required that United States officers observe quantities and other restraints established by any state respecting vessels arriving in, or bound to, any port or district thereof.

The Thirteenth Congress by an act of August 2, 1813 (3 Stat., 72), defined retailers in imported goods, wares or merchandise, as well as in wines and liquors, and required that every retailer of such commodities shall obtain a license from the collector appointed by virtue of the act. This statute provided also "that no license shall be granted to any person to sell wines, distilled spirituous liquors, **or merchandise**, as aforesaid who is prohibited to sell the same by any state."

An act approved March 3, 1825 (4 Stat., 115), provided for the punishment in accordance with the laws of the state in which the place is situated, of offense com-

mitted in places under the jurisdiction of the United States, where the offense was not theretofore punishable by the courts of the United States.

By an act approved July 3, 1866 (14 Stat., 82), regulations were made by the Congress for the transportation of explosives. Among other provisions of the statute was one that the regulation so made would not be construed as to prevent any state from prohibiting or regulating the traffic in, or transportation of, such explosives, or from prohibiting the introduction thereof into the state for sale, use or consumption therein.

And by an act approved May 9, 1902 (32 Stat., 193), it was provided that imitation cheese or imitation butter transported from one state into another, shall upon arrival within the limits of the state of destination, be subject to the operation and effect of the laws of such state, and shall not be exempt therefrom by reason of being introduced into the state in the original package or otherwise.

Thus, we have had a **national policy**, established with the beginning of our government, designed **to prevent the superior powers of the federal government from impeding the operation of state laws in matters affecting the welfare of the citizens of the several states.**

These policies have always been sustained by this court whenever they have been called into question. Indeed, it would appear that this court has suggested this course in certain instances. In the case of **Robbins v. Shelby County Taxing District, supra,** involving a Tennessee statute prohibiting the sale by drummers and

other persons not having a regular licensed place of business within the taxing district, of goods, wares and merchandise, by sample, except upon payment of a privilege tax, it was said by the court:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand." P. 498 (698).

In the case of **Bowman v. Railway Co.**, 125 U. S., 465, 31 L. Ed., 700, the court stated:

> "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of **commodities** between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases **by the express permission of Congress.**" P. 485 (707). (Boldface ours.)

This suggestion is repeated several times in the opinion.

And in the case of **Leisy v. Hardin, supra,** it was said that:

> "a subject matter within the exclusive jurisdiction of Congress 'is not within the jurisdiction of the police power of the state, **unless placed there by congressional action.**" (Citing cases.) P. 108 (132). (Boldface ours.)
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> * * * * * * * * * *
>
> "Undoubtedly it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, * * * **the responsibility is upon Congress**, so far as the regulation of interstate commerce is con-

cerned, **to remove the restriction upon the state in dealing with imported articles of trade within its limits,** which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." P. 123-124 (137). (Boldface ours.)

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And the court concluded:

"Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in **Gibbons v. Ogden**, 9 Wheat, 1, 238, 6 L. Ed., 23, 80, in 'a frank and candid cooperation for the general good.'"

The same idea was expressed in **Lyng v. State**, 135 U. S., 161, 34 L. Ed., 152. In this case the court said:

"The same rule that applies to * * * the products * * * of any state, applies to **all commodities** in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts, and the usages of the commercial world. **It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances.**" P. 167 (153). (Boldface ours.)

And in **Schollenberger v. Pennsylvania**, 171 U. S., 1, 43 L. Ed., 49, involving oleomargarine, Mr. Justice Peckham stated for the court:

"**In the absence of congressional legislation,** therefore, the right to import a lawful article of commerce from one state to another continues until a

sale in the original package in which the article was introduced into the state." P. 23 (57). (Boldface ours.)

It may be observed that in these opinions the court referred consistently to "articles of commerce," "articles of trade" and the "transportation of commodities."

It will also be observed that the court did not declare that a state is under all conditions denied jurisdiction to control imported articles. On the contrary, the court contemplated a condition where the state might act. The decisions only established the principle that "in the absence of congressional permission" it cannot do so. These repeated and emphatic assertions of this court, even before the issue was squarely presented to it, and the decisions of this court hereinafter discussed, we submit, unmistakably establish the right of Congress to place within the jurisdiction of a state, upon importation, articles or transactions over which the state has jurisdiction except for the exclusive power of Congress to regulate commerce.

## V.

## EXERCISE OF POWER TO REGULATE MAY, WHEN NECESSARY, TAKE THE FORM OF PROHIBITION.

This court has recognized in a long line of decisions that regulation as to certain articles and practices can only be accomplished by absolutely prohibiting the use of the facilities of interstate commerce in the transportation of such articles. One of the cases illustrating the application of this principle is **Champion v. Ames, supra**, which sustained an act of Congress prohibiting the importation into the United States or the transportation from one state to any other state of **"any paper, certificate or instrument"** purporting to be or represent a lottery ticket. The Supreme Court in sustaining this absolute prohibition of interstate commerce in lottery tickets stated:

> "We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states." P. 354 (500).
>
> "If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people of all the states,** and under

> the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?" P. 355 (501). (Boldface ours.)

We emphasize that the court did not base its decision upon the ground that the "paper, certificate or instrument" was inherently harmful or deleterious. In fact such article in itself is no more harmful or deleterious than the articles involved in this case. The decision was based upon the fact that many states of the union had recognized "the evils that inhere in the raising of money in that mode," and therefore, the action of Congress

> "only supplemented the action of those states—perhaps all of them—which for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. **We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.** We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce." P. 357, P. 358 (502). (Boldface ours.)

The Congress has enacted a statute prohibiting the transportation of stolen motor vehicles in interstate or foreign commrece. That act was sustained by this court in **Brooks v. United States**, 267 U. S., 432, 69 L. Ed., 699,

although a stolen automobile is not in itself more inherently harmful or noxious than one not stolen. It is the transportation and sale in interstate commerce of stolen automobiles, just as it is the transportation and sale in interstate commerce of prison made goods in states restricting such sale, that causes the evil. Mr. Chief Justice Taft, speaking for the court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the **spread of any evil**, or **harm to the people of other states from the state of origin.**" P. 436 (701). (Boldface ours.)

In 1912 Congress saw fit to exercise its powers to regulate interstate commerce in a far more drastic and questionable manner than in the passage of the **Hawes-Cooper Act.** We refer to the act of July 31, 1912 (37 Stats., at L. 240; U. S. C. A., Title 18, Sec. 405), which act, without reference to whether the several states regulated or prohibited the showing of prize fight films, expressly prohibited the importation into the United States and the transportation in interstate commerce of such films. This court, in the case of **Weber v. Freed**, 239 U. S., 325, 60 L. Ed., 308, upheld the constitutionality of that act. Although the court was there concerned with a case of importation of a prize fight film from a foreign country, the courts throughout the country have considered the Weber case as dispositive of all questions of constitutionality of that act. See **United States v. John-**

**ston**, 232 Fed., 970, and **Rose v. St. Clair**, 28 Fed. (2d), 189, both cases relating to transportation of prize fight films in interstate commerce. It is respectfully but emphatically submitted that if Congress may prohibit the importation into Ohio of prize fight films from another state, Ohio permitting the showing of such films, it assuredly may not be contended that Congress is without power to permit Ohio to place foreign prison made goods in the same category with its own prison made goods.

In the case of **Hipolite Egg Co. v. United States**, 220 U. S., 45, 55 L. Ed., 364, it was held to be within the regulatory power of Congress to prohibit the transportation in interstate commerce of adulterated **or misbranded** articles of food. This legislation was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States**, 227 U. S., 308, 57 L. Ed., 523, the prohibition by congressional enactment of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of state laws forbidding prostitution and the same argument was urged against its validity, that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by this court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime.

It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the states." P. 321 (527). (Boldface ours.)

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"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral." P. 322 (527).

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"Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibition must be applied. We may illustrate again by the pure food and drug act. Let an article • • • be misrepresented by false branding, and Congress may exercise its prohibitive power." P. 322 (527).

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## VI.

## THE EXTENT TO WHICH A POWER OF CONGRESS TO REGULATE MAY BE EXERCISED, IS WITHIN THE DISCRETION OF CONGRESS.

There are many instances where the Congress has exercised its regulatory powers over interstate commerce to a lesser degree than by absolute prohibition of such commerce in the subjects regulated.

Particularly pertinent is the **Wilson Act** (26 Stat., 313), providing that intoxicating liquors transported from one state to another and remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state be subject to the operation and effect of the laws of the same, to the same extent and in the same manner as though such liquors had been produced therein, whether introduced in the original package or otherwise. This statute was sustained in **Wilkerson v. Rahrer (In re Rahrer)**, 140 U. S., 545, 35 L. Ed., 572, in which it was said by Mr. Chief Justice Fuller on behalf of the court:

> "And this court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government." P. 554 (574).

It was stated by the court that the adoption of the Constitution placed in the Congress the power to prevent the enactment by the states of commercial regulations discriminatory in character or detrimental to the common interests.

> "But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question." P. 561 (576).
>
> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress." P. 565 (578).

Further example may be found in the **Lacey Act** (31 Stat., 187), making unlawful the transportation to any other state of the dead bodies of any game animals or birds which have been killed or shipped in violation of the laws of the state in which they were killed or shipped. The same act provides that the dead bodies of game animals or birds transported from one state into another for use, consumption or sale therein, shall be subject to the operation and effect of the laws of the state of destination, to the same extent and in the same manner as if such animals or birds had been produced in such state.

These statutes, as was pointed out by the court, re-

lated to wholesome articles of food, and have been sustained in many cases.

**New York, ex rel. Silz, v. Hesterberg,** 211 U. S., 31, 53 L. Ed., 75;
**LaCoste v. Department of Conservation of State of Louisiana,** 263 U. S., 545, 68 L. Ed., 437;
**Rupert v. United States,** 181 Fed., 87;
**State v. Heger,** 194 Mo., 707, 83 S. W., 252.

In **New York, ex rel. Silz, v. Hesterberg, supra,** the relator was arrested for having in his possession the dead body of a golden plover, and the dead body of a grouse which had been lawfully taken in England and Russia respectively, and imported into the United States in accordance with the provisions of the tariff laws thereof, during the open season for such birds in New York state. The New York statute prohibited possession of plover and grouse during specified seasons of the year Such imported birds were varieties different in form, size, color and markings, from birds known as plover and grouse in the state of New York. They could be distinguished even when cooked and ready for the table. The birds were sound, wholesome and valuable articles of food and recognized as articles of commerce in different countries of Europe and the United States.

Mr. Justice Day in delivering the opinion of the court sustaining the statute stated that it was the purpose of the Legislature,

> "by laws alike applicable to foreign and domestic game, to protect the people of the state in the right to use and enjoy the game of the state.

"The New York Court of Appeals further held that the so-called Lacey Act (31 Stat., at L. 187, Chap. 553, U. C. Comp. Stat., 1901, P. 290), relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson Act was sustained by this court. In re Rahrer (Wilkerson v. Rahrer), 140 U. S., 545, 35 L. Ed., 572, 11 Sup. Ct. Rep., 865.

"In the aspect in which the game law of New York is now before this court we think it was a valid exertion of the police power, independent of any authorization thereof by the Lacey Act, and we shall therefore not stop to examine the provisions of that act." P. 43-44 (81).

And the Supreme Court of Missouri, in **State v. Heger, supra,** held a statute prescribing a fine for the selling of game, whether taken within or without the state, to be not in violation of the commerce clause of the Constitution of the United States in view of the **Lacey Act.** In that case the court said:

"But even if it be conceded that there is a distinction between a shipment of game taken in this state to a point outside of this state, and a shipment of game taken in another state to a point in this state, and that in the latter case the consignor acquired a property interest in the game thus shipped, making it an article of interstate commerce, to regulate which the Legislature has no power, it will not be denied that the right to so regulate rests in Congress. * * * So that whatever doubt may have existed as to which tribunal, the Congress of the United States or the Legislature of this state, has the power and authority to regulate or prohibit the keeping and selling of game taken in another

state and shipped to a point in this state is put at rest by Section 5'' (of the Lacy Act, subjecting the dead bodies of game animals and game birds to the operation of the laws of the state upon their arrival therein.) (P. 714.)

The **Webb-Kenyon Act** (37 Stat., 699), which prohibits the transportation of intoxicating liquors into states where the same were "intended to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state," was sustained in the case of **James Clark Distilling Company v. Western Maryland Ry. Co.**, 242 U. S., 311, 61 L. Ed., 332. The court in its opinion was careful to point out to those who expressed the fear that to sustain the act might lay the basis for subjecting interstate commerce in all articles to state control, that such regulation might not be made except as to those articles over which the states, within the scope of their jurisdiction, possessed an undisputed right of control. Said the court:

"Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. **The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guar-**

anties of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." P. 332 (341). (Boldface ours.)

We submit that this James Clark Distilling Company case directly supports the constitutionality of the Hawes-Cooper Act here under attack. Petitioner's attempt to distinguish this case from the case at bar is feeble. Can it be said that intoxicating liquor, the sale of which was then regulated or prohibited by most of the states, was an article less "exceptional" in its nature, than is prison made goods, the sale of which on the open market is now prohibited or otherwise regulated by most of the states? A mere statement of the question impels the answer. Surely liquor, the sale of which was then thought to be so injurious to the health and welfare of the states, is no more exceptional than the unrestricted sale on the open market of prison made goods which thirty states have declared is injurious and disastrous to the economic health and welfare of their citizens. Fine distinctions cannot and may not be drawn to the effect that things which injure the physical or moral welfare are more ex-

ceptional in their nature than things which injure the economic welfare. Each must be on an equal footing—each is vital to the general welfare.

We might also cite the fact that Congress has prohibited the interstate transportation of diseased cattle and persons, obscene literature and many other articles of a similar nature.

But in each of these instances, whether the regulation of interstate commerce in specific articles took the form of prohibition of transportation, or whether the regulation merely prescribed the regular means for accomplishing the introduction and incorporation of the articles mentioned into and with the mass of property in the state, or whether the regulation simply prohibited transportation into states where the articles mentioned were to be used in violation of state laws, or prohibited transportation into other states of articles taken in violation of the laws of the state of origin, the articles regulated, while not necessarily harmful in themselves, were of a sort, or the effect of their use was such, as to give both state and nation, within the respective spheres of their authority, supreme power over them, before the passage by the Congress of the acts complained of in the various cases. **The test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. State v. Clausen**, 65 Wash., 156, 117 Pac., 1101, 37 L. R. A. (N. S.), 466. In other words, such regulation by Congress rested "upon the character of the particular subjects dealt with and the fact that the scope of govern-

mental authority, state or national, possessed over them is such," that the regulation made in each instance was justified. **Hammer v. Dagenhart**, 247 U. S., 251, 270, 62 L. Ed., 1101, 1105.

It may be reiterated that each of these congressional enactments was in aid of the enforcement of local policies of the states enacted in the exercise of their undisputed right to prohibit, within the limits of their authority, the use of such articles in a manner inimical to the general welfare—material or moral.

## VII.

## THE HAWES-COOPER ACT DELEGATES NO POWER TO THE STATES TO REGULATE INTERSTATE COMMERCE, AND HAS BEEN SO CONSTRUED.

It is contended by the petitioner that the Hawes-Cooper Act is in effect a prohibition of interstate commerce, similar to that attempted by the **Child Labor Act** (39 Stat., 675) and is therefore invalid; or that it is a delegation to the respective states of the power invested in the Congress to regulate commerce, and is invalid on that ground. This contention is wholly without merit. The act is upon its face a regulation—not a prohibition of commerce, nor a delegation of power.

It is settled by an abundance of authority that in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction which had been previously given to such language by

the courts and to have used it according to that interpretation which is known and established.

**Hecht v. Malley**, 265 U. S., 144, 68 L. Ed., 949;
**Sessions v. Romadka**, 145 U. S., 29, 43, 36 L. Ed., 609, 614;
**Latimer v. United States**, 223 U. S., 501, 604, 56 L. Ed., 526, 527.

The language of the **Hawes-Cooper Act** is identical, except as to the commodity involved, with the **Wilson Act**, the **Lacey Act**, and the **Oleomargarine Act**.

This language has been construed so frequently that its meaning is no longer open to question. It was said in the **Rahrer case, supra**, that:

> "It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state." P. 560 (576).

But that in adopting the **Wilson** Act the Congress,

> "has not attempted to delegate the power to regulate commerce or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property." P. 561 (576).
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> "No reason is perceived why, if Congress chooses to provide **that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.**" P. 562 (577). Boldface ours.)
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> • • • • • • • • • • •

"Congress did not use terms of permission to the state to act, **but simply removed an impediment to the enforcement of the state laws** in respect to imported packages in their original condition, **created by the absence of a specific utterance on its part.** It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." P. 564 (577). (Boldface ours.)

In the **Clark Distilling Company case, supra**, the court again construed the language of the **Wilson Act** to be a proper regulation of commerce. It was said:

"As we have already pointed out, the very **regulation made by Congress in enacting the Wilson Law** to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. P. 330, (340) (Boldface ours).

. . . . . .

"As the power to **regulate which was manifested in the Wilson Act**, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity,—a result which, as we have previously said, would reverse **Leisy v. Hardin** and overthrow the many adjudications of this court sustaining the Wilson Act. P. 330 (340) (Boldface ours).

. . . . . .

"Or, in other words, stating the necessary result

of the argument from a concrete consideration of the particular subject here involved, that because Congress, in adopting a regulation, had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both state and nation, in their respective spheres of authority, possessed the supremest authority before the action of Congress which is complained of; and hence the argument virtually comes to the assertion that, in some undisclosed way, by the exertion of congressional authority, power possessed has evaporated." P. 331, (340-341).

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The language here has been before the Supreme Court in many cases since that time, and the construction made in the **Rahrer case** has been repeatedly affirmed, and had therefore become firmly established at the time of the enactment of the act in question here.

See

**Rhodes v. Iowa**, 170 U. S., 412, 42 L. Ed., 1088;
**American Express Company v. Iowa**, 196 U. S., 133; 49 L. Ed., 417;
**Pabst Brewing Co. v. Crenshaw**, 198 U. S., 17, 49 L. Ed., 925;
**Rosenberger v. Pacific Express Co.**, 241 U. S., 48, 60 L. Ed., 880;
**Delamater v. South Dakota**, 205 U. S., 93, 51 L. Ed., 724.

## VIII.

## THE CHILD LABOR CASE SUPPORTS THE CONSTITUTIONALITY OF THE HAWES-COOPER ACT.

The petitioner herein relies upon the decision in the **Child Labor** case, **Hammer v. Dagenhart, supra**, as authority for the assertion that the regulation provided in this act may not be made. The statute under attack in that case had no similarity in meaning or effect to the one under consideration here, and in the light of the intention of Congress to adopt the construction which had been made of the language used in the **Hawes-Cooper Act**, it cannot be contended that the decision in the **Child Labor case** is controlling.

It must be remembered that the **Child Labor** statute attempted to prohibit the transportation in interstate commerce of all goods which had been produced by child labor. The prohibition was not limited to those goods produced by a state with the enforced labor of children or to those goods destined to states whose laws prohibited their use or sale. It applied without limit to all goods produced in free factories with free labor, in violation of the terms of the act. The difference between child labor and prison labor is obvious. As was said in **Ex Parte Wilson**, 114 U. S., 417, 429, 29 L. Ed., 89, 93:

> "Imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words, '**involuntary servitude** for crime', spoken of in the provision

of the Ordinance of 1787, and the Thirteenth Amendment of the Constitution, by which **all other slavery** was abolished." (Boldface ours.)

An important distinction between child labor and prison labor rests upon the contention that free child labor at least has the right to bargain for satisfactory wages. On the other hand, prisoners have no choice in the matter. We submit that this court in the **Child Labor case** reaffirmed the doctrines upon which regulations by the Congress similar to that here under attack had previously been sustained, and those principles absolutely support this legislation.

It was urged by the government in that case that adjudicated cases established the doctrine that the power given to Congress to regulate commerce incidently included the authority to prohibit the movement in interstate commerce of ordinary commodities. But the court said that the decisions rested "upon the **character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them** is such that the authority to prohibit is as to them but the exertion of the power to regulate." P. 270, (1105). (Boldface ours.)

And further:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." P. 273, 274, (1106).

* * * * * * * * * *

"The maintenance of the authority of the stat
over matters purely local is as essential to the pre
ervation of our institutions as is the conservati
of the supremacy of the federal power in all matte
entrusted to the nation by the federal Constitution
P. 275, (1107).

In other words, the Congress had there passed a la
which attempted to fix a standard for the manufactu
of commodities. In the case at bar we are concerned wi
a rule for the introduction and incorporation of prisc
made articles into and with the mass of the property
a state, thereby removing an impediment to the enforc
ment of state laws in respect to original packages of su
goods, asserted to exist by the absence of a specific utt
ance upon the part of Congress. Here Congress is mere
saying that its control over interstate commerce shall
exercised in consideration of the "nature and charact
of our dual system of government, state and nation, a
instead of absolutely prohibiting has so conformed
regulation as to produce cooperation between the loc
and national forces of government, to the end of p
serving the rights of all."

The law here is not an invasion of state sovereign
as was the Child Labor Law, but on the contrary is
support of state rights and state sovereignty. This ca
is therefore more than one to be distinguished from t
**Child Labor case**,—it is an opposite case, and the **Ch**
**Labor case** supports the court of the **Hawes-Cooper A**

CONSTITUTIONALITY

Whether the enactment is wise or unwise, whether
is based on sound economic theory, whether it is the b
means to achieve the desired result, whether, in sho

the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. **Chicago, B. & Q. R. Co. v. McGuire**, 219 U. S., 549, 569, 55 L. Ed., 328, 339; **Chicago, R. I. & P. R. Co. v. Perry**, 259 U. S., 548, 556, 66 L. Ed., 1056, 1061; **German Alliance Ins. Co. v. Lewis**, 233 U. S., 389, 414, 58 L. Ed., 1011, 1022. It is sufficient to say that Congress in its judgment has recognized what thirty states have sought to control, the traffic in prison made goods; a traffic and an evil recognized even by the Constitution of Ohio (Article II, Sec. 41, Appendix).

## IX.

## ORIGIN OF COMMODITIES DOES NOT EXEMPT INTERSTATE COMMERCE IN THEM FROM REGULATION BY CONGRESS.

The contention of the petition that the origin or ownership of the articles involved in this controversy exempts interstate commerce in them from regulation by the Congress has no basis either in reason or in authority. The whole argument of the petitioner is to the effect that while Congress has the power to regulate commerce in articles produced by free labor, by manufacturers who pay taxes, it has no authority to place any restraint upon the business of dealing in the products of human misfortune; that the only authority Congress has with

reference to these commodities is to remain silent, since if Congress acts at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

This argument is completely refuted by the language of the court in the **Rahrer case**:

> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.
>
> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." P. 562 (577).

The Congress is not to be denied the power to protect navigation on all waterways of the United States against unreasonable obstructions, even though such obstructions were created under sanction of a state. And whether the obstruction is unreasonable is to be determined by Congress. **Union Bridge Co. v. United States**, 204 U. S., 364, 401, 51 L. Ed., 523, 539. It may prevent a conspiracy to obstruct interstate transportation of hats from a state to the various places of their destination, "although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and, some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of federal authority."

**Loewe v. Lawlor**, 208 U. S., 274, 301, 52 L. Ed., 488, 502.

The argument that the control of the states over manufacture prevented Congress from exercising its power to regulate commerce was urged in the case of **Standard Oil Company v. United States**, 221 U. S., 1, 68, 69, 55 L. Ed., 619, 648. In referring to this contention it was stated by the court:

> "So far as the objections of the appellants are concerned, they are all embraced under two headings:
>
> a. That the act, even if the averments of the bill be true, cannot be constitutionally applied because to do so would extend the power of Congress to subjects **dehors** the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in **United States v. E. C. Knight Co.**, 156 U. S., 1, 39 L. Ed., 325, 15 Sup. Ct. Rep., 249. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice."

And the Congress may prohibit the payment, by advertising, for interstate travel although payment in this manner is expressly authorized by state law.

> **Chicago, I. and L. Ry. Co. v. United States**, 219 U. S., 486, 496, 55 L. Ed., 305, 309.

While the Congress may not make it unlawful to misbrand articles of food, it is a legitimate exertion of the power of Congress to regulate interstate commerce to

make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded.

**Weeks v. United States**, 245 U. S., 618, 622, 62 L. Ed., 513, 515.

Why, then, may not Congress adopt such regulations of interstate commerce in prison-made goods as will permit the effective operation of the policies of the several states enacted in the promotion of the public welfare of the people thereof, by preventing the destruction of the industries, and the reduction of the labor of the state to a condition of unemployment or servility? We submit it may.

## X.

## UNDER ITS POLICE POWER A STATE MAY PROHIBIT THE SALE ON THE OPEN MARKET OF PRISON-MADE GOODS.

We assume that it will not be disputed by the petitioner that the general scope of the police power extends to placing all necessary restraints and burdens on persons and property in order to preserve and promote what the prevailing public opinion of the state deems to be the general welfare of the people thereof.

A state may legislate to suppress an evil, "increase

the industries of the state * * * and add to its wealth and prosperity".

**Barbier v. Connolly**, 113 U. S., 27, 31, 28 L. Ed., 924;
**Bowman v. Chicago and Northwestern Ry. Co., supra;**
**Central Lumber Co. v. South Dakota**, 226 U. S., 157, 57 L. Ed., 164;
**Quong Wing v. Kirkendall**, 223 U. S., 59, 56 L. Ed., 350;
**Booth v. Illinois**, 184 U. S., 425, 46 L. Ed., 623;
**Chicago B. & Q. R. Co. v. Illinois**, 200 U. S., 561, 50 L. Ed., 596;
**Lake Shore and M. S. R. Co. v. Ohio**, 173 U. S., 285, 43 L. Ed., 702;
**Armour & Co. v. North Dakota**, 240 U. S., 510, 60 L. Ed., 771;
**Nebbia v. New York, supra.**

The police power of a state is that inherent power of the sovereign to govern, and includes everything essential to public good. The only limitation upon the power is that it may not be exerted arbitrarily or with unjust discrimination.

In **Barbier v. Connolly, supra**, the court said that the Fourteenth Amendment, broad and comprehensive as it is, was not designed to interfere with the power of the state,

> "to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." P. 31 (925).
>
> * * * * * * * * * *
>
> "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, **but to pro-**

**mote**, with as little individual inconvenience as possible, **the general good.**" PP. 31 and 32 (925).

In the concurring opinion of Mr. Justice Field in the **Bowman case, supra**, it was pointed out that:

> "The state possesses the power to prescribe all such regulations with respect to the possession, use and sale of property within its limits as may be necessary to protect the health, lives, and morals of its people; **and that power may be applied to all kinds of property, even that which in its nature is harmless.**" P. 501 (712). (Boldface ours.)

And Mr. Justice Holmes, speaking for this court in **Central Lumber Co. v. South Dakota**, supra, said:

> "If the Legislature shares the now **prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its laws against what it deems the evil as it actually exists** without covering the whole field of possible abuses, **and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.**" P. 160 (169). (Boldface ours.)

That case sustained the right of the state to prevent price discrimination between sections of the state when such discrimination was for the purpose of preventing competition.

In **Noble State Bank v. Haskell**, 219 U. S., 104, 55 L. Ed., 112, it was said that the police power of a state may be said in a general way to extend to all great public needs.

> "**It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or**

**strong and preponderant opinion to be greatly and immediately necessary to the public welfare.** Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions to successful commerce." P. 111 (116). (Boldface ours.)

Mr. Justice Harlan, speaking for the court in the **Booth case, supra,** said:

"Is it true that the Legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious." P. 429 (626).

In the **Armour case, supra,** the court stated at page 513 (774):

"We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the Legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, **there was not necessarily meant some definite injury, but obstacles to a greater public welfare.** Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws." (Boldface ours.)

And as was stated by Mr. Justice McKenna in **Rast v. Van Deman & Lewis Co.,** 240 U. S., 342, 357, 60 L. Ed., 679, 687:

"It is the duty and function of the Legislature to discern and correct evils, and by evils we do not

mean some definite injury, **but obstacles to a greater public welfare. Eubank v. Richmond**, 226 U. S., 137, 142, 57 L. Ed., 156, 158; **Sligh v. Kirkwood**, 237 U. S., 52, 59, 59 L. Ed., 835, 837." (Boldface ours.)

It was stated by the Supreme Court of Washington in the case of **Davis-Smith Co. v. Clausen**, 65 Wash., 156, 117 Pac., 1101, that under the police power a state might,

"regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employers engaged in it, the people surrounding it, **or to any considerable number of people at large**, no matter from whatsoever cause the menace may arise."

It has been said by the Supreme Court of Ohio, in **Phillips v. State**, 77 Ohio St., 214, 82 N. E., 1064, that:

"It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and **best interests of the commonwealth** may be done under the police power; and this implies that **private rights exist subject to the public welfare.**" (Boldface ours.)

So in **Boston Beer Co. v. Massachusetts**, 97 U. S., 25, 24 L. Ed., 989, it was said:

"If the public safety or the public morals require the discontinuance of **any** manufacture or **traffic**, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." P. 32 (992).

In **Mugler v. Kansas**, 123 U. S., 623, 31 L. Ed., 205, Mr. Justice Harlan stated:

"No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares

to be prejudicial to the general welfare." P. 663, (211).

Therefore, when a business becomes prejudicial to the public welfare, or becomes a menace to any considerable number of people at large it may be prohobited. In **Murphy v. California,** 225 U. S., 623, 56 L. Ed., 1229, Mr. Justice Lamar stated:

> "The Fourteenth Amendment * * * does not prevent legislation intended to regulate useful occupations which, because of their nature * * * may prove injurious or offensive to the public." P. 628 (1232).

And the "regulation or prohibition need not be postponed until the evil has become flagrant". P. 629 (1232).

The business of selling stock on margin or for future delivery may be prohibited. **Otis v. Parker,** 187 U. S., 606, 47 L. Ed., 323. In that case it was said:

> "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" P. 609, 327.

And in the **Hannibal & St. Joseph R. Co. v. Husen,** 95 U. S., 465, 24 L. Ed., 527, it was stated that:

> "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils." P. 471 (530).

And in the very recent **Nebbia case, supra,** Mr. Justice Roberts, for the court, reaffirmed these principles. He said:

> "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government." P. 524 (949).
>
> "The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community." P. 525 (950).
>
> • • • • • • • • • •
>
> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business or to pursue a calling may be conditioned." P. 527-528 (951-952).
>
> • • • • • • • • • •
>
> "So far as the requirement of due process is concerned, • • •. a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared, by the Legislature to override it." P. 537 (957).

And further:

> "The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people." P. 539 (958).

Further examples are unnecessary. In general it may be stated that the possession and enjoyment of all rights,

even to the right of traffic in prison-made goods are held subject to such regulations as are necessary for the public good.

It must be recognized, however, that the state has even a broader control over prison-made goods than it might have over the products of private industry. It is a control which emanates from the exercise of a governmental function.

Unquestionably the authorities agree that the erection of prisons for the detention of those convicted of crime is a governmental function in which the public generally is concerned. They are operated by the state in the exercise of its sovereign powers in the performance of its duty in the administration of its criminal laws enacted for the preservation of order and the security of society, 21 R. C. L., 1168.

**District of Columbia v. Totten** (App. D. C.) 5 Fed. (2d), 374, 376.

And this power, resting as it does in the Legislature "is to be exercised, like all other powers of government as a trust for the benefit of the people, **and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.**" **Geer v. Connecticut**, 161 U. S., 519, 529, 40 L. Ed., 793, 797. (Boldface ours.)

And this duty can neither be limited, abdicated nor bargained away by contract or otherwise.

**Atlantic Coast Line Ry. Co. v. Goldsboro**, 232 U. S., 548, 58 L. Ed., 721;
**Stone v. Mississippi**, 101 U. S., 814, 25 L. Ed., 1079.

It is also well recognized that the labor of the prisoner and the products thereof during the period of his incarceration belong to the people of the state in their sovereign capacity and may be disposed of only in such a way as the Legislature in its discretion may determine.

**State v. McCauley**, 15 Cal., 429, L. R. A., 1916 D., 661;
**Hancock v. Ewing**, 55 Mo., 101;
**State ex rel Greaves v. Henry**, 87 Miss., 125, 5 L. R. A. (N. S.), 340, 345;
**Jones Hollow Ware Co. v. Crane**, 134 Md., 106 Atlantic 274, 3 A. L. R. 1658, 1670;
**Georgia Penitentiary Company v. Helms**, 65 Ga., 499;
**Shenandoah Lime Co. v. Governor**, 115 V., 865.

The fact that Alabama has determined that the public welfare is better served by permitting the unrestricted sale of prison goods in all its markets, does not permit it to make that determination for Ohio. It is for Ohio to decide whether the public welfare of the state requires that no prison-made goods may be sold in the general internal markets of the state.

**Geer v. Connecticut, Supra**, p. 530 (797);
**In re Rahrer, supra**;
**Ex Parte Maier**, 103 Cal., 476, 37 Pac., 402;
**Magner v. People**, 97 Ill., 320;
**Johnson et al v. Gentry, et al**, 30 P. (2d), 400;
**Union Fisherman's Co. v. Shoemaker**, 98 Or., 659, 193, p. 476.

In **Ex Parte Maier, supra**, in upholding a statute prohibiting the sale of deer meat, and applying to deer im-

ported as well as those taken within the state it was said:

> "The wild game within a state belongs to the people of the state in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; **and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.**" (Boldface ours.)

And in **Magner v. People, supra,** the Supreme Court of Illinois stated:

> "It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the **duty** of the Legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. **But in any view, the question of individual enjoyment is one of public policy and not of private right.**" (Boldface ours.)

In **Johnson et al v. Gentry, et al, supra,** the California Supreme Court sustained a statute of that state which set up during the closed season for salmon fishing within the state, a barrier to the transportation through the state of salmon caught outside the jurisdiction of the state.

In **Union Fishermen's Co. v. Shoemaker, supra,** an Oregon statute enacted to make effective the declared policy of the state with reference to taking fish from its own waters, and which prohibited the possession of sal-

mon, which were in this case caught on the high seas, was sustained. The court said:

> "Of course the state of Oregon has no jurisdiction over the waters of the Pacific ocean beyond the three mile limit; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three mile limit unlawful. The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do so is settled beyond controversy."

This doctrine has been so universally established that it is unnecessary to do more than cite a few of the cases supporting it.

**Wells v. Penton**, 99 Fla., 1069, 128 So., 500;
**People v. Booth Fisheries Co.**, 253 Ill., 423, 97 N. E., 837;
**Stevens v. State**, 89 Md., 669, 43 At., 929;
**Roth v. State**, 51 Ohio, 209, 37 N. E., 259.

Each state, therefore, has the inherent right to determine its public policy with respect to the business of selling prison-made goods, and it may adopt such regulations regarding the same as is determined to be in the public interest.

But it is contended by the petitioner that the powers of the state and nation may not be exercised to eliminate evils which are economic in character. This contention finds no support in the decisions. The courts have specifically held otherwise.

In the **Nebbia case, supra**, it was declared by the court to be within the police power of the state to correct eco-

nomic ills by appropriate legislation. It upheld the right of the state to so control the milk industry as to prevent serious economic losses to the people of the state and to prevent the demoralization of prices for the commodity, and the curtailment or destruction of the industry.

We have heretofore shown that certain prison-made commodities have already driven out of business private manufacturers of similar articles, and that increased sale in other prison-made commodities are threatening destruction of private manufacture of those commodities.

The Congress has in other instances acted directly, within the scope of its authority, to protect the people of the United States from evils much less destructive in character than these.

By reason of the decision in the case of **United States ex rel Attorney General v. Delaware and Hudson Company**, 213 U. S., 366, 53 L. Ed., 836, sustaining the commodities clause of the **Hepburn Act** (34 Stat., 584), interstate rail carriers are prohibited from transporting in interstate commerce any commodity (except timber and the products thereof, and such other articles as may be necessary and intended for use by it in the conduct of its business) manufactured or mined by it or under its authority, and in which it has an interest, direct or indirect. This is true although the state may have encouraged the combination of the railroad and mining or manufacturing business, as had Pennsylvania. In that case the court said:

> "The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce.

> That it was, we think is apparent, and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New Haven case to which we have previously referred." P. 415 (852).

The reasons for the decision in the **Delaware & Hudson** case are identical with those upon which the decision in the case of **New York, N. H. & H. R. Co. v. Interstate Commerce Commission,** 200 U. S., 361, 50 L. Ed., 515, rested. The question presented there was whether an interstate carrier might agree to sell and transport a commodity when the stipulated price does not pay the cost of purchase, the cost of delivery and the published freight rates. It involved the validity of that part of the **Interstate Commerce Act,** requiring adherence to published tariffs and prohibiting secret departures therefrom. The court pointed out that the effect which would inevitably result in permitting a public carrier to deal in commodities under circumstances where it could discriminate against other dealers in the same commodities would be an ultimate acquisition of a monopoly in the business of dealing in such products. The court stated:

> "Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monop-

olization in the hands of such persons of all the products as to which the carrier chose to deal. * * * To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and **eliminate the cost of transportation to such market**, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer." P. 392 (521-522).

The analogy to be drawn is clear.

Likewise, the Congress has acted directly to protect the people of the United States against the effect of the importation of cheap labor. As stated by Mr. Justice Hughes, in **Bailey v. Alabama**, 219 U. S., 219, 245, 55 L. Ed., 191, 202:

> "There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

In the case of **Church of the Holy Trinity v. United States**, 143 U. S., 457, 463, 36 L. Ed., 226, 229, the court sustained the right of Congress to legislate for the purpose of maintaining the labor standards in this country, by making unlawful the importation of laborers under contract to perform labor. The court in its decision quoted with approval a statement by Mr. Justice Brown in a previous case, as to the necessity for the act, as follows:

> "The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when as district judge, he decided the case of **United States v. Craig**, 28 Fed. Rep., 795, 798: 'The motives

> and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. * * *"

This statement was reaffirmed in the case of **Sharrenberg v. Dollar Steamship Co.**, 245 U. S., 122, 126, 62 L. Ed., 189, 192, in which Mr. Justice Clarke, speaking for the court said:

> "The purpose of this alien labor legislation was declared by this court almost thirty years ago, in **Holy Trinity Church v. United States**, 143 U. S., 457, 36 L. Ed., 226, 12 Sup. Ct. Rep., 511, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant."

The Congress has been mindful of the effect of the sale of prison-made goods, and has taken other steps other than the one attacked here to remedy the evils.

The Congress for many years has prohibited the importation into the United States of goods manufactured in whole or in part by convict labor, and has provided that no goods manufactured in federal prisons may be sold in the markets of the United States.

In 1904, there was passed an act (33 Stat., 435) which provides that the post office department shall not purchase materials or supplies manufactured by convict labor. In 1905 President Theodore Roosevelt issued an executive order (Ex. Order No. 325-a) prohibiting any of the officers and agents of the United States from contracting for supplies manufactured by convict labor.

The Reconstruction Finance Corporation Act, as amended (Title 15 U. S. C. A., Sec. 605 (b), para. 6), provides that all loans and contracts made by the Reconstruction Finance Corporation for the construction of public works shall be subject to the condition, among others, **that no convict labor shall be** directly employed on any such project.

The Appropriations Act approved June 30, 1932 (47 Stat., 418), prohibited the purchase of any materials or services to be furnished or performed by convict labor.

## XI.

## THE PROVISIONS OF THE OHIO STATUTES ARE REASONABLE REGULATIONS DESIGNED TO PROMOTE THE PUBLIC WELFARE.

Sections 2228-1 and 2228-2, General Code of Ohio, were enacted by the Legislature and approved March 23, 1933. Let us see what situation confronted the Legislature at that time. It is a matter of common knowledge that in the year 1932, the period midway between the approval of the **Hawes-Cooper Act** and its effective date that goods in the value of approximately $28,000,000 were manufac-

tured in state prisons and sold in the markets of the country, and that 65.7 per cent (as against 58 per cent in 1923) of such goods were sold outside the state where produced, thereby imposing upon certain unwilling states most of the burden of the maintenance of the prisons for the administration of the criminal laws of those states which still used "unskilled hands to manufacture and place on the market inferior goods."

It is also commonly known that in all the prisons of the country 82,000 prisoners were engaged in productive employment in 1932, as against 51,000 prisoners so engaged in 1923; that more than 19,000 prisoners were engaged in the production of clothing alone in 1932, as against 10,000 in 1923.

During this same period, 1923 to 1932, the number of free establishments in Ohio manufacturing textile products decreased from 679 to 567, while the number of employees in such manufacture decreased from 47,879 in 1923 to 34,088 in 1932. The average wage during this same period in the men's clothing division of the textile manufacturing industry in the state of Ohio decreased from $1,054 in 1923 to $667 in 1932. Similar decreases are to be noted in other divisions of the industry. (Bulletin No. 613, Bureau of Labor Statistics, United States Department of Labor.)

More than 19,000,000 work shirts (as against 13,800,000 in 1923) were manufactured in prisons and sold in the open market in 1932 in competition with approximately 62,000,000 work shirts made by free labor; 7,000,000 pairs of pants were produced in prisons and sold

upon the open market in competition with 27,000,000 pairs of work pants made in private factories for the same year and in addition some 640,000 pairs of overalls were produced in prison factories during the same period. In 1923, the prisons produced only 3,000,000 pairs of pants. There were sold upon the open market in 1932 more than 3,000,000 brooms in competition with private broom factories, in which the blind are very widely employed. As against 61,000,000 pounds of twine and rope produced by prisons in 1923, more than 63,000,000 pounds of binder twine alone were so produced in 1932, and sold in competition with 158,000,000 pounds of such twine produced by private industry with free labor. This latter figure is to be compared with more than 240,000,000 pounds sold by free industry in 1923. In addition to the binder twine more than 3,500,000 pounds of rope made by prisons went into competition with rope produced by private industry in 1932.

In 1932 approximately 4,000,000 suits of underwear were made in prisons for sale on the open market, as against approximately 15,000 in 1923. Prisons produced for sale in the open market in 1932 approximately 1,500,000 children's play suits as against 919,000 in 1923; in 1932 there were produced by the prisons for sale approximately 2,000,000 dresses, while available reports do not show that any were produced in 1923; that in 1932 approximately 800,000 wood chairs were produced in prisons for sale in the general markets as against 400,000 in 1923. Many other items might be mentioned but those are sufficient to show the trend of prison production

which concerned the state of Ohio when it came to consider the problem in 1933. (See United States Department of Labor Bulletin No. 595, Prison Labor in the United States, 1932.)

These facts, could but lead to the conclusion that continued unrestricted commerce in prison-made commodities was destructive of the general welfare.

Indeed, the inevitable result of the situation confronting the state would be to enable the prisons and their agents or distributors to so concentrate in their own hands the production and sale in the general markets of particular commodities, thereby driving out of business the legitimate manufacturer of similar articles. To illustrate: If a dealer in prison-made goods, produced in subsidized factories, by forced labor, without certain normal elements of production costs, such as decent wages, rent, capital investment, taxes, overhead items, customary selling costs and factory supervision, has free access to the same markets as do dealers in goods made in private factories, no other person can possibly market a competitive commodity and remain in business.

For it cannot be challenged that certain prisons were rapidly approaching the position of sole producers of certain commodities previously produced by independent manufacturers. The facts were not mere accidental developments but were clearly the result of the freedom from restriction which prison-made commodities enjoyed.

The effect of such commerce was to break the labor market, to reduce free laborers, engaged in competitive

occupations, almost to the level of the convicts, and to drive out of business those manufacturers who could not successfully meet prison prices in the marts of trade.

There was grave danger that they may, if left uncontrolled and free from the rules of normal trade, dominate the entire business of the country in any commodity, as they have already done with respect to some commodities. If they can threaten the general welfare and prosperity of a state by the destruction of private industry with regard to twine, shirts, brooms, stoves, hollow-ware, etc., what is to prevent their invasion of any commercial field?

The prison knows no limitation upon the quantity of the commodities to be produced; the only limitation arises out of the number of prisoners available for production. There is manifestly great detriment to the public interest lurking in an unrestricted, rampant, irresponsible and uncontrolled system of prison sales.

The Constitution and the statutes of Ohio show a long continued recognition by the people and the Legislature of the state that a clear distinction exists between goods made by convicts and those made by free labor in free institutions. Prison labor, as this court has said, is a species of slave labor. **Ex Parte Wilson, supra.** The principle, therefore, is that convict-made goods differ from similar articles manufactured by free labor, not merely that they have a different origin, but they differ fundamentally in that they are virtually a product of slave labor.

While the state of Alabama produced only 43,046 ar-

ticles of clothing for sale in the general markets of the country in 1923, the petitioner is now asserting the right to nullify the laws of Ohio by sending into that state and selling upon the open market prison-made goods in unlimited quantities. He claims freedom from control in the sale in Ohio, despite the will of that state as expressed by its Legislature, of the more than 2,000,000 shirts, and the 2,750,000 suits of underwear, in addition to almost 100,000 miscellaneous articles of clothing, or in the sale in Massachusetts, Pennsylvania or New York against their will of the 4,000,000 pounds of cotton yard goods, **produced in 1932 by forced labor, at a labor cost of 15 cents per week for ten hours of labor per day.** In 1932 goods in the value of $3,000,000 were produced by the Alabama state prison system. Of this amount, goods valued at $2,691,916 were sold outside the state thereby compelling, by use of interstate commerce, other states, many of them unwilling to do so, to assume almost the entire cost for the maintenance and operation of Alabama prisons. (See Prison Labor in the United States, 1932, Bulletin of Bureau of Labor Statistics, No. 595.)

It is essential to note that these prison products were made with the cotton raised by the prison of Alabama, spun by the prison of Alabama, and woven into cloth by the prison of Alabama.

No further proof than this is required to show the destructive effect of unrestricted commerce in such articles. And while Ohio may not directly regulate interstate commerce in prison-made goods, it is not bound to furnish unrestricted markets for them, nor to abstain from the

passage of any law with respect thereto, which it may deem necessary to guard the general welfare of its people.

The case of **Baldwin v. Seelig**, 294 U. S., 511, 79 L. Ed., 1032, is urged as authority against the validity of the Ohio statute. The decision in that case rests upon exactly the same principle as the decision in the **Bowman** and **Leisy cases, supra,** rested. The question in the **Baldwin case** was the right of the importer of milk to sell it free of the restraints of state legislation. Congress had made no regulation upon the subject, and of course, it was held that state jurisdiction did not attach until after sale by the importer, by which act it becomes mingled in the common mass of the property of the state. That case has no application to the one under consideration, unless it can be said to overrule the **Nebbia case.** No one would suggest such a construction of the decision.

In the case at bar the Congress has made a regulation of interstate commerce in prison-made goods, which regulation "imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The statute of the state of Ohio is not "a law enacted in the unauthorized exercise of a power exclusively confided to Congress," but is "a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress."

Thirty states with a population of more than 90,000,000 people have found the necessity for similar regula-

tion of the traffic in merchandise manufactured within prison walls. The very nature of the business of selling prison-made goods as shown by matters of judicial knowledge is dangerous to the state because it depresses the wages of free labor, produces unemployment, and destroys either the profits of private industry or threatens the very existence of industry itself. Here was an evil, a mischief, a harm inimical to the welfare of the citizens of these states, and if this is borne in mind, it must be conceded that the exercise of the power of the state to make the regulation involved here is a reasonable exercise of Ohio's police power.

## XII.

## THE ENFORCEMENT OF THE STATUTES INVOLVED DOES NOT VIOLATE THE TENTH AMENDMENT.

The contention of the petitioner that the Ohio statutes aided by the **Hawes-Cooper Act**, must fail because they contravene the Tenth Amendment, is fully answered by the reasons heretofore given in the cases cited.

The state of Ohio under the powers reserved to it by the Tenth Amendment may legislate according to its conceptions of public welfare, which includes whatever will promote the peace, comfort, convenience and prosperity of its people.

**Escanaba Co. v. Chicago**, 107 U. S., 678, 27 L. Ed., 442;
**Petersen v. Iowa ex rel State Treasurer**, 245 U. S., 170, 62 L. Ed., 225;
**Lehon v. Atlanta**, 242 U. S., 53, 61 L. Ed., 145;
**Nebbia v. New York, supra.**

The Ohio statute in no respect whatever attempts to extend its regulation into the state of Alabama. That state is still free to employ its convicts in any labor which it may determine is most beneficial to the welfare of the state.

Certainly the contention would not be made by the state of Alabama that its law prohibiting the manufacture and sale of intoxicating liquor, the enforcement of which is aided by the **Wilson Act** was designed to prohibit manufacture and sale of liquor for instance in the state of Kentucky.

The Tenth Amendment does not reserve to Alabama the right to violate the laws of Ohio enacted in the exercise of the powers reserved to it by the same amendment.

The **Hawes-Cooper Act** was enacted under the powers expressly delegated to Congress. It withdraws the cloak of immunity from convict-made goods in the hands of the importer in the state of destination, so as to aid in making effective the public policy of those states which have found traffic in prison-made goods to be detrimental to the public interests.

The **Hawes-Cooper Act** does not attempt to **require** states to exercise their police power to change their prison systems in any particular. It merely **permits** the police power of the states to effectively operate within their limits while the articles prescribed by the exercise of that power are in the hands of the importer.

## XIII.

## THE OHIO LAW PROHIBITING THE SALE OF PRISON-MADE GOODS ON THE OPEN MARKET IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The proposition that the Fourteenth Amendment does not guarantee to any person the right to engage in unlawful pursuits is so well established that no argument is needed to support it. The business of dealing in prison-made goods is inherently subject to legislative control, and no such vested right in the business exists as will prevent the Legislature from withdrawing the right to deal in such goods from those who previously enjoyed it.

**Boston Beer Company v. Massachusetts, supra;**
**Tracy v. Ginzberg,** 205 U. S., 170, 51 L. Ed., 755.

The Legislature of Alabama may at its will change the prison system of the state so as to prohibit the manufacture of commodities for sale in the general markets, and the petitioner could not be heard to complain that such action deprived it of its property without due process of law, for the reason that the business of dealing in such goods is not a matter of private right, but is one of public policy.

**Hancock v. Ewing, supra;**
**State v. McCauley, supra;**
**Jones Hollow Ware Co. v. Crane, supra.**

A business that is lawful today may in the future, because of a changed situation, the growth of population or other causes become a menace to the public welfare, be required to yield to the public good. **Pierce Oil Corp. v. City of Hope**, 248 U. S., 498, 63 L. Ed., 381. And if the petitioner has embarked in a business which the public interest demands shall be prohibited, he must know prohibition will ensue. **Nebbia v. New York, supra.** For the Fourteenth Amendment does not limit nor was it intended to limit the subjects upon which the police power of a state may be lawfully exerted.

**Jones v. Brim**, 165 U. S., 180, 41 L. Ed., 677.

The Ohio statute here under attack makes no discrimination against convict-made goods coming into it from without the state. The Legislature acted to protect the people from the injurious effects of selling convict-made goods in the open market, by laws applicable alike to such goods produced within the state and those imported from without.

And that was the interpretation placed upon the statute by the state courts. It was said by the Ohio Court of Appeals in this case, **Whitfield v. State of Ohio**, 49 O. App., 530, 535, 536:

> "The laws of Ohio prohibit the manufacture of convict-made goods in Ohio, except for use in correctional institutions, and thereby preclude their sale in the open market. The argument of plaintiff in error to the effect that Section 2228-1 of the General Code deprives citizens of the United States who have merchandise made by convicts of other states from competing with convict-made goods in the state of

Ohio, appears to us without force, since the use to be made of convict-made goods in Ohio is limited to correctional and other public institutions.

"As we interpret the laws of Ohio, there can be no sale in the open market of goods made by convicts in the state of Ohio; and that the use of such manufactured convict-made goods in Ohio is limited so as to preclude their sale in the open market. There is therefore, no discrimination against citizens or other states when they are prohibited from selling convict-made goods manufactured in another state in the open market in the state of Ohio."

The case of **Arnold v. Zanders**, 56 Ohio St., 417, 47 N. E., 50, referred to in petitioner's brief held an act of the Ohio legislature of May 19, 1894, which restricted the sale in Ohio of prison-made goods to be violative of the federal Constitution. The decision was grounded solely upon the fact that Congress had not authorized such action. The court said, at page 421:

"To give a state Legislature power to legislate in such cases, requires an act of Congress to that effect. **Leisy v. Hardin**, 135 U. S., 100; **Welton v. Missouri**, 91 U. S., 275."

This early case is interesting as showing a recognition of the power of Congress to act in such cases, and as showing a recognition 40 years ago by Ohio's Legislature of the evils of the unregulated sale of prison-made goods.

## XIV.

## CONCLUSION.

The **Hawes-Cooper Act** has been sustained as to constitutionality by the courts of last resort of two states—Ohio, in this case, and Wisconsin, in **Wisconsin v. Whitfield**, 216 Wis., 577, 257 N. E., 601. The Supreme Court of Albany county, New York, in **Greenthal v. Bennett, Attorney General**, on January 5, 1934, also sustained this act. No court has held it invalid.

The concern which the people of the various states have had with respect to the constantly increasing volume of prison-made goods going into the commerce of the country is reflected in the history of the statutes of nearly three-fourths of the states enacted over a period of half a century.

This court throughout its history has consistently upheld the valid exercise of the police power of state and nation in the protection of the welfare of their citizens as evidenced by its decisions in upholding restrictive measures regulating interstate commerce in game birds, cigarettes, intoxicating liquor, lottery tickets, certain motion picture films, misbranded food stuffs, stolen automobiles, trafficking in women, etc. In no single instance, where the nation and state have acted concertedly, within their powers as in the case at bar, to suppress an acknowledged evil affecting the public welfare, has this court declared such action to be violative of any constitutional provision, federal or state, but has on the contrary zealously upheld and guarded the exercise of such powers.

This court in maintaining our dual sovereignty has

impartially and fearlessly protected the rights and powers of the federal government and at the same time has protected the states against improper encroachment by the federal government.

To set aside the **Hawes-Cooper Act** as violative of any constitutional provision would be to deny to Congress the power to enable those states to correct an evil inimicable to the welfare of their people and to construe the Constitution so as to accomplish an end which its farmers sought to preclude.

To sustain the acts, on the other hand, "affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

The decision of the Supreme Court of Ohio should be sustained.

Respectfully submitted,

ALFRED CLUM,
Director of Law, City of Cleveland,

STEPHEN GOBOZY,
Asst. Pros. Attorney, City of Cleveland,
Counsel for Respondent.

Of Counsel:

JOHN W. BRICKER,
Attorney General of Ohio,
WILLIAM S. EVATT,
Chief Counsel, Office of Attorney General,
HARRY B. HAWES,
RAYMOND A. WALSH,
BON GEASLIN,
Special Counsel.

## APPENDIX.

45 Stat., 1084:

"All goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in federal penal and correctional institutions for use by the federal government, transported into any state or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such state or territory be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such state or territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

"Sec. 2. This act shall take effect five years after the date of its approval.

"Approved, January 19, 1929."

Section 41 of Article 2 of the Constitution of the state of Ohio:

"Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories of the state; **and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away;** * * *." Boldface ours.)

Section 2228, General Code of Ohio:

"The board of managers of the Ohio penitentiary, the board of managers of the Ohio State reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, **or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation.** Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter." (Boldface ours.)

* * * * * * * * * *

Section 2230, General Code of Ohio:

"Nature of work by convicts.—Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile, and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

* * * * * * * * * *

Section 2231, General Code of Ohio:

"Disposition of products.—Such tile, brick and culvert pipe and road building material and such

products of convict or prison labor as are used in the construction or repair of the public roads shall be furnished the political divisions of this state at cost. The convicts from the penitentiary shall not be intermingled with the convicts from the reformatory in the performance of such labor."

Sections 2228-1 and 2228-2 of the General Code of Ohio:

"2228-1. After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state.

"2228-2. Whoever violates any of the provisions of the next preceding section shall be fined not less than twenty-five nor more than fifty dollars for the first offense and not less than fifty nor more than two hundred dollars for each subsequent offense."

Section 2228-1, General Code of Ohio, as amended June 4, 1935:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined, wholly or in part in this or any other state by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this state."